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IN THE

Supreme Court of the United States

OCTOBER TERM 1940.

NO. 564

MASCOT STOVE COMPANY, a Corporation, *Petitioner*,

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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OCTOBER TERM 1940.

NO. ——

MASCOT STOVE COMPANY, a Corporation, *Petitioner*,

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The undersigned, on behalf of the above named petitioner, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit entered June 3, 1941, in the above entitled proceedings, docketed therein as No. 8595.

Opinions.

The opinion of the United States Board of Tax Appeals is reported at pages 27 *et seq.* of the record. The opinion of the United States Circuit Court of Appeals for the Sixth Circuit is not yet reported, but found at pages 46 *et seq.* of the record herein.

Jurisdiction.

The judgment of the United States Circuit Court of Appeals for the Sixth Circuit was entered on June 3, 1941. The jurisdiction of this Court is invoked under the provisions of Section 347(a), Title 28, U. S. C. A.

Questions Presented.

The question presented in this case is whether or not the petitioner is a corporation resulting from a reorganization within the meaning of Sections 112(i) and 113(7) of the Revenue Act of 1932, c. 209, 47 Stat. 169; also whether the decision of the Court in this case is in conflict with the decision of Courts of equal jurisdiction in other Circuits.

Statutes Involved.

Subsection (i) of Section 112 of the Revenue Act of 1932, c. 209, 47 Stat. 169, reads as follows:

> "(i) DEFINITION OF REORGANIZATION.—As used in this section and sections 113 and 115—
>
> (1) The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitali-

zation, or (D) a mere change in identity, form, or place of organization, however effected.

(2) The term 'a party to a reorganization' includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation.

(j) DEFINITION OF CONTROL.—As used in this section the term 'control' means the ownership of at least 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of the corporation."

* * * *

Subsection (7) of Section 113 of the Revenue Act of 1932 reads as follows:

"(7) TRANSFERS TO CORPORATION WHERE CONTROL OF PROPERTY REMAINS IN SAME PERSONS.—If the property was acquired after December 31, 1917, by a corporation in connection with a reorganization, and immediately after the transfer an interest or control in such property of 50 per centum or more remained in the same persons or any of them, then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made. This paragraph shall not apply if the property acquired consists of stock or securities in a corporation a party to the reorganization, unless acquired by the issuance of stock or securities of the transferee as the consideration in whole or in part for the transfer."

Statement.

The petitioner is a manufacturing corporation, organized under the laws of Tennessee, and is engaged in the business of manufacturing and selling cooking and heating stoves with its principal place of business at Chattanooga,

Tennessee, and is the successor to a prior corporation that was adjudged a bankrupt on June 20, 1933 (R. p. 27). The fiscal year involved ended June 30, 1934.

The prior corporation held a charter issued by the State of Tennessee under the name of Mascot Stove Manufacturing Company, and at the time of adjudication in bankruptcy its officers and stockholders formed themselves into a committee to be represented by Alvin Ziegler (one of such officers and stockholders) as Trustee, for the purpose of effecting a reorganization of the bankrupt corporation (R. pp. 31-32).

The old company owned unencumbered assets of the book value of $39,496.00, consisting of current inventories and accounts receivable (R. p. 32), and owned real estate, buildings, machinery, plant fixtures and good will which were encumbered by a first mortgage or deed of trust in the amount of $33,000 (R. p. 31).

The inventoried assets of the old company of the fair value of $28,184.34 in a going business (cost or market whichever is lower), was appraised in the bankruptcy proceeding at the value of $9,280.50 (R. p. 27) separate and apart from the factory building, patterns, machinery (used in their fabrication) and good will; and the current accounts receivable of $22,608.92 (subject to an assignment of $11,297.26 to a finance company) were appraised at $2,351.75 (R. p. 27).

The officers and stockholders of the old company were greatly concerned in holding together in one business unit the assets of the old company, and by negotiations through Alvin Ziegler, as their Trustee, made an agreement with the holder of the trust note of $33,000 to acquire the equity in the property pledged as security for its payment; and in pursuance of such an agreement the Trustee in Bankruptcy, representing the old company, was directed by the referee in bankruptcy to make a quit-claim deed for such mortgaged property to Luke O. Morin (as associate of Alvin Ziegler and President of the old company) as Trustee for himself and a corporation to be organized (R. p. 27).

Also, Alvin Ziegler, as Trustee for the officers and stockholders of the old company, submitted a written offer to the Trustee in Bankruptcy, as representative of the old company and its creditors, to pay to him for distribution to creditors the sum of $7,500 in cash and notes for the inventoried assets and accounts receivable of the old company (R. p. 27). It was made known by Ziegler, as Trustee for stockholders, to the Trustee of the estate of the bankrupt corporation, that it was his purpose to organize a new corporation to take over the properties, good will, and business of the bankrupt corporation; execute a new mortgage or deed of trust to the secured creditor of the bankrupt corporation, and issue the stock of the new corporation to the stockholders of the old corporation who held not less than 76 per cent of the stock of the old corporation (R. pp. 28 and 32).

Upon the payment of Ziegler, Trustee, of $2,500 to the Trustee of the estate of the bankrupt corporation, the referee in bankruptcy approved the acceptance of the offer of Ziegler as Trustee for the officers and stockholders of the old company and directed the Trustee of the bankrupt estate to turn over to Ziegler the assets and property of the bankrupt corporation; and to accept the notes of Alvin Ziegler, Trustee, for the amount of $5,000, secured by an hypothecation of the notes of the new company to be organized by Ziegler and the stockholders of the old company in the aggregate amount of $5,000 (R. pp. 31 and 34). The amount of $7,500 apparently included substantially all of the unsecured indebtedness of the bankrupt corporation that it was unable to pay promptly.

The offer of Ziegler, Trustee, was accepted by the Trustee of the bankrupt estate on July 7, 1933, and on July 8, 1933, Alvin Ziegler, Trustee, acting for the stockholders of the old company, procured a charter for petitioner, and completed its organization on July 14, 1933, by a transfer of the properties of the bankrupt estate released to him by the Trustee in Bankruptcy for that purpose (R. p. 29).

The common stock of the new company (after the payment in of $6,000 of preferred stock by common stockholders of the old company) was issued to Alvin Ziegler, Trustee, to be distributed to the stockholders of the old company in substantially the same proportion in which they held the stock of the old company at time of adjudication (R. pp. 28 and 32); and the notes of the new company in the amount of $5,000 were delivered to the Trustee in Bankruptcy.

The involuntary adjudication in bankruptcy of the Mascot Stove Manufacturing Company was not planned as a step "in pursuance of a plan of reorganization", but after the adjudication was made on June 20, 1933, it became the basis of a plan (in cooperation with the Trustee in Bankruptcy), to have the properties of the old corporation transferred to Alvin Ziegler, as Trustee for the stockholders of the old company in order that the business of the old company could be reorganized and continued without substantial interruption by keeping its properties and good will unified in the business for the benefit of *creditors* and *stockholders* (R. pp. 31-32).

There was a substantial equitable value attached to the inventoried assets of the old company and its accounts receivable, which would be lost to its creditors and stockholders in the event a reorganization of its business could not be brought about under the plan pursued; and in pursuance of the plan, the new corporation was to execute notes for unsecured debts to be delivered to the Trustee in Bankruptcy by Alvin Ziegler, Trustee (R. pp. 31 and 34).

During the period of reorganization (which began at the time of adjudication (R. p. 31), the Trustee in Bankruptcy (being in charge of the bankrupt's estate) made the transfer of its properties to the new company, or Alvin Ziegler, as Trustee for stockholders of the old company, and accepted cash and notes therefor. The cash and notes received by Ziegler from the new company were paid over to the Trustee in Bankruptcy; and the stock of the new company was delivered to the stockholders of the old company (R. pp. 31 to 34). Immediately after the Trustee of the

bankrupt transferred the properties of the old company to the new company (in pursuance of the plan of reorganization), 80 per cent or more control of the property remained in the same persons, or 76 per cent of them, who were stockholders of the old company prior to the adjudication; and during the time required to perfect the plan for a reorganization of the business of the bankrupt, no independent or adverse interest in the property was present (see findings of fact by the Board, R. pp. 27 *et seq.*). The Trustee of the bankrupt's estate acted in a fiduciary capacity; and his interest in the properties of the bankrupt was not adverse to the interest of creditors and stockholders of the old company, under the plan of reorganization that was carried out.

Notwithstanding the Board of Tax Appeals finds that there was a plan adopted for the reorganization of the business of the old company (R. p. 22), and that the plan was carried out in a way that was satisfactory to the Bankruptcy Court; and notwithstanding the Board finds that the plan provided that the stockholders of the old company should be the sole stockholders of the new company (R. p. 18), the Court of Appeals for the Sixth Circuit holds that the intervention of a bankruptcy proceeding as a part of a plan of reorganization deprives the transaction of the features of a reorganization as defined by Sections 112(i) and 113(7) of the Revenue Act of 1932. The Court holds that the new company is not entitled to the same basis of the properties acquired that was recognized for them in the hands of the old company, notwithstanding 50 per cent or more control of the properties remained in the same persons or some of them.

Specification of Errors.

The United States Circuit Court of Appeals erred:

1. In holding that officers and stockholders of a corporation that has been adjudged a bankrupt may not, with the full cooperation of the Trustee in Bankruptcy

(whose conduct is approved by the Court) effect a reorganization of its business and property within the meaning of Sections 112(i) and 113(7) of the Revenue Act of 1932, and

2. In holding that petitioner is not entitled to the same basis for the properties acquired that was recognized as the basis in the hands of the prior corporate owner, as provided by Section 113(7) of the Revenue Act of 1932.

Reasons for Granting the Writ.

1. There is a direct conflict between the decision of the Court in this case and the decision of the Court of Appeals for the Seventh Circuit in the case of *Rex Manufacturing Company* v. *Commissioner,* 102 Fed. (2d) 325; and the Court says that insofar as its decision herein is inconsistent with the decision in the case of *Rex Manufacturing Company, supra,* it declines to follow that case.

2. The question of law presented in this proceeding is identical with the question presented in the case of *Rex Manufacturing Company* v. *Commissioner,* 102 Fed. (2d) 325; and the facts in each case are not to be distinguished on the application of such question of law, and the construction of the identical statutes involved in each case (Sections 112(i) and 113(7) of the Revenue Act of 1932).

3. Also, the opinion of the Court in this case is directly in conflict with its opinion in the case of *Commissioner* v. *Newberry Lumber & Chemical Company,* 94 Fed. (2d) 447, and the opinion of the Circuit Court of Appeals for the Seventh Circuit in the case of *Commissioner* v. *Kitselman,* 89 Fed. (2d) 458. In each of the foregoing cases it was held that a reorganization within the meaning of Sections 112(i) and 113(7) of the Revenue Act of 1932 may be effected in connection with an insolvency proceeding in equity or bankruptcy.

4. In a recent opinion of the Circuit Court of Appeals for the Ninth Circuit in the case of *Commissioner* v. *Marlborough Investment Company, et al.*, decided March 8, 1941, the Court declined to follow the opinions of the Sixth and Seventh Circuits in the cases of *Kitselman* and *Newberry Lumber & Chemical Company, supra.* It is understood that an application for certiorari has been applied for in the *Marlborough Investment Company case* for a review by this Court of the decision therein; and that the Department of Justice has joined in the request for the issuance of a writ in that case.

5. It is submitted that if the writ in the *Marlborough Investment Company case, supra,* be granted to reconcile the conflict there admitted to be present by analogy; that a writ should also be granted in this case to reconcile the conflict which the Court below recognizes to be present with the case of *Rex Manufacturing Company, supra.* The opinion of the Court in the *Rex Manufacturing Company case, supra,* is based upon the opinions of the Court in the *Kitselman* and *Newberry Lumber & Chemical Company cases, supra;* and the Court of Appeals for the Ninth Circuit undertakes to depart from the decisions in the *Kitselman, Newberry Lumber & Chemical Company,* and *Rex Manufacturing Company cases, supra,* because it says those cases are in conflict with the case of *LeTulle* v. *Scofield, Collector,* 308 U. S. 415.

6. By the conflict which arises in this case, and the other cases involving related questions of law, the application of Sections 112(i) and 113(7) of the Revenue Act of 1932 (as they may be invoked under varying circumstances of fact) is in a state of hopeless confusion. Such a state of hopeless confusion in the application of Sections 112(i) and 113(7) of the Revenue Act of

1932, will prevail in the Courts below until authoritatively settled by an opinion by this Court in each case in which there is now a direct conflict.

WHEREFORE, in order to have the conflict appearing herein settled by an authoritative decision of this Court, petitioner respectfully prays that a writ of certiorari may be issued herein directed to the United States Circuit Court of Appeals for the Sixth Circuit commanding said Court to certify and send to this Court on a day certain to be therein designated a full and complete transcript of the record and proceedings of said Circuit Court of Appeals in this case, entitled *Mascot Stove Company* v. *Commissioner of Internal Revenue,* No. 8595, to the end that said case may be reviewed and determined by this Court as provided by law, and that petitioner may have such other and further relief or remedy in the premises as to this Court may seem appropriate, and that said judgment of said Circuit Court of Appeals may be reversed by this Honorable Court.

Respectfully submitted,

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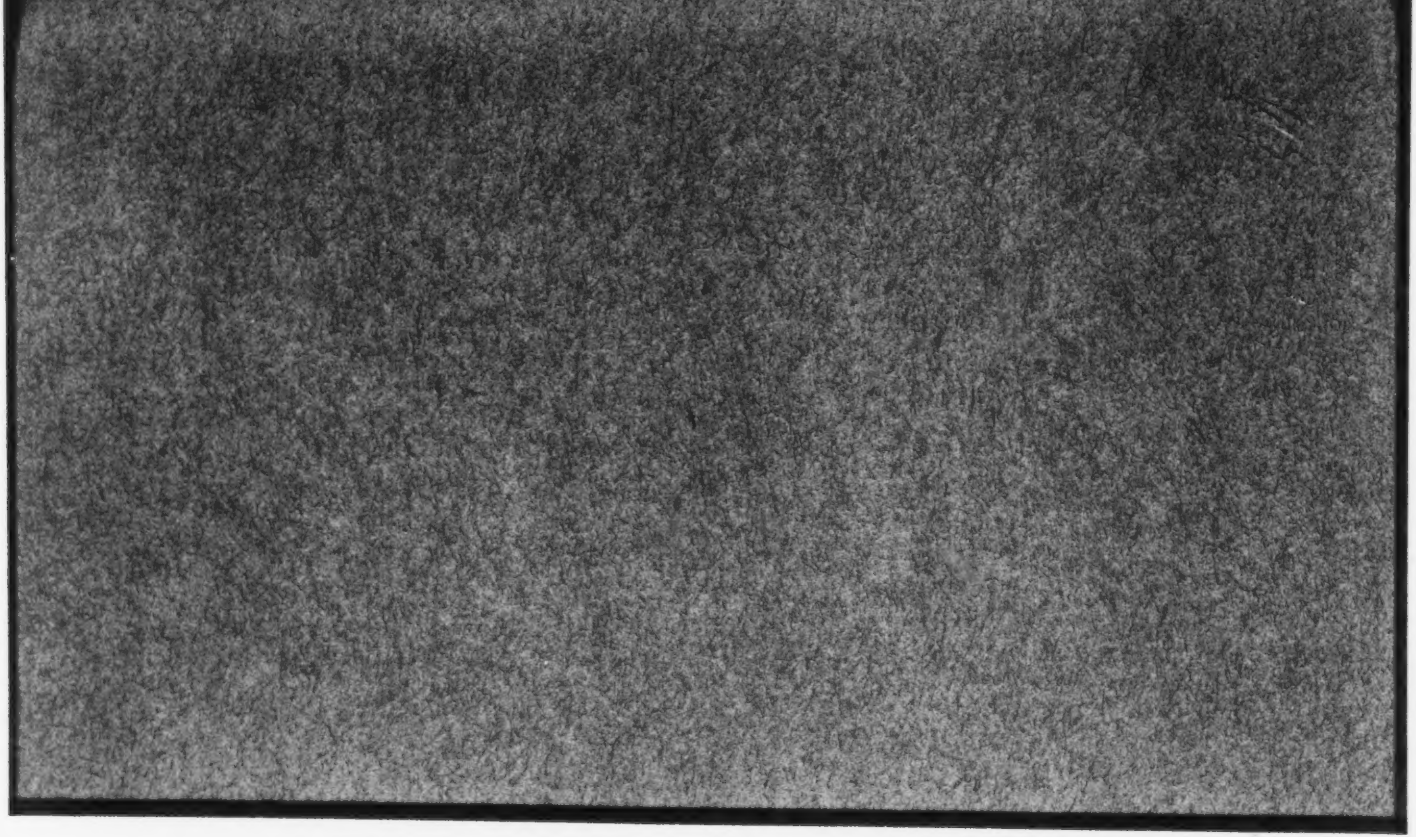

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In the Supreme Court of the United States

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No. 564

MASCOT STOVE COMPANY, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The original opinion of the Board of Tax Appeals is an unreported memorandum opinion (R. 13–25),[1] which upon review by the whole Board was thereafter modified (R. 26–39), and reported in 40 B. T. A. 1057. The opinion of the Circuit Court of Appeals (R. 46–51) is reported in 120 F. (2d) 153.

[1] This is not properly a part of the record. Section 906 (b) of the Revenue Act of 1924, 43 Stat. 253, as amended by Section 601 of the Revenue Act of 1928, 45 Stat. 791 (U. S. C., Title 26, Sec. 618 (b)).

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 3, 1941. (R. 45.) The petition for a writ of certiorari was filed August 29, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

After the adjudication in bankruptcy, certain stockholders of the bankrupt corporation purchased its assets from the trustee in bankruptcy, formed a new corporation and transferred the assets to the new corporation. Did the new corporation acquire those assets pursuant to a "reorganization" within the meaning of Section 112 (i) (1) of the Revenue Act of 1932, so that its basis for those assets was the same as the basis of the old corporation?

STATUTES INVOLVED

Revenue Act of 1932, 47 Stat. 169:

> SEC. 112. RECOGNITION OF GAIN OR LOSS.
>
> * * * * *
>
> (i) *Definition of Reorganization.*—As used in this section and sections 113 and 115—
>
> (1) The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of an-

other corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected.

(2) The term "a party to a reorganization" includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation.

* * * * *

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (Unadjusted) of Property.*— The basis of property shall be the cost of such property; except that—

* * * * *

(7) *Transfers to corporation where control of property remains in same persons.*— If the property was acquired after December 31, 1917, by a corporation in connection with a reorganization, and immediately after the transfer an interest or control in such property of 50 per centum or more remained in the same persons or any of them, then the basis shall be the same as it would be in the hands of the transferor, increased

in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made. This paragraph shall not apply if the property acquired consists of stock or securities in a corporation a party to the reorganization, unless acquired by the issuance of stock or securities of the transferee as the consideration in whole or in part for the transfer.

* * * * *

STATEMENT

On June 20, 1933, the Mascot Stove Manufacturing Company, hereinafter called the old company, was adjudicated an involuntary bankrupt (R. 3, 27). Its real estate and machinery, tools, and other equipment were encumbered by a mortgage which together with interest and taxes exceeded $30,000. The property covered by the mortgage was appraised in the bankruptcy proceedings for less than the amount of the mortgage (R. 27).

On July 7, 1933, Alvin Ziegler, acting as trustee for a group of stockholders of the old company (R. 27–28), made an offer to pay $7,500 for those assets of the old company which were not covered by the mortgage. These assets, which had been appraised at $9,280.50, consisted mainly of an inventory of materials and an equity in accounts receivable. The accounts receivable were subject

to a lien in favor of a finance company and the old company's equity in these accounts was appraised at $2,351.75 (R. 27). Ziegler's offer was accepted. The terms of the sale required the payment of $2,500 in cash and the delivery of four notes payable in 30, 60, 90, and 120 days. In this transaction Ziegler represented persons who held a total of 3,076 shares out of approximately 3,800 outstanding shares of the old company (R. 27–28).[2]

On July 3, 1933, one Luke O. Morin, an associate of Ziegler, acting as trustee for himself and a corporation to be organized, had made an offer to the trustee in bankruptcy to pay $50 for the mortgaged property, the conveyance to be made subject to the mortgage and existing liens. This offer was accepted by the trustee in bankruptcy (R. 27).

On July 7, 1933, application for the incorporation of the petitioner herein, the Mascot Stove Company, hereinafter called the new company, was made in Tennessee. The charter was issued on July 8, 1933 (R. 28). The new company was authorized to issue 500 shares of preferred stock having a par value of $100 per share and 5,000

[2] Whether Ziegler also represented the petitioner was the subject of a lively controversy in the Board of Tax Appeals (R. 33). The Board held that he did (R. 35), but that the same result would be reached in any event (R. 36). Petitioner apparently agrees it is a matter of indifference whether petitioner acquired the assets directly from the trustee in bankruptcy or indirectly through Ziegler (Pet. 6–7).

shares of no par common stock. Alvin Ziegler subscribed for 10 shares of the preferred stock for himself and 50 shares for two other persons who were stockholders in the old company (R. 29–30). The preferred stock was paid for in cash, $6,000 (R. 30). Ziegler transferred to the new company the inventory assets and accounts receivable of the old company; the assets of the old company which had been subject to the mortgage were deeded to the new company by the mortgagee (the mortgagee had foreclosed on the mortgage (R. 29)), and the new company executed a new mortgage to the mortgagee. The new company paid Ziegler $2,500 in cash for the assets which he had transferred to it and executed to him four notes corresponding to the notes which Ziegler had executed to the trustee in bankruptcy for those assets (R. 31). These four notes were paid by the new company (R. 31). The new company also issued to Ziegler and the stockholders whom he represented 5,000 shares of no par common stock. The interest of each person in the property acquired by Ziegler at the bankruptcy sale was in the ratio that the number of shares held by him in the old company bore to the total number of shares in the old company represented by the group of stockholders for whom Ziegler was the trustee (R. 31). The amount of stock in the new corporation which each was entitled to receive and did receive was in substan-

tially the same proportion as his ownership of the assets exchanged for stock, although the stock certificates issued at a later date were not in the same proportion (R. 31).

The new company realized a profit in the fiscal year ending June 30, 1934, on certain assets which it had acquired in the above-described transactions. The issue between the Government and the taxpayer is as to the proper basis for the determination of the gain. The Commissioner determined that the basis was the price paid for the assets by the taxpayer and his determination was sustained by the Board of Tax Appeals and by the court below. The taxpayer maintains that its basis is the same as the basis of the assets in the hands of the old company, upon the theory that they were acquired pursuant to a "reorganization" within the meaning of Sections 112 (i) and 113 (a) (7) of the Revenue Act of 1932.

ARGUMENT

1. The court below correctly held that the purchase of assets at the bankruptcy sale either directly by petitioner or indirectly through certain individuals, did not constitute a reorganization.

The old company was insolvent and the old stockholders' equity had been wiped out. To the extent that any of the old stockholders acquired an interest in the new company, they acquired it by purchase for cash at the bankruptcy sale.

Their interest in the new company did not stem from their ownership of stock in the old company, and the situation is no different from what would be the case if total strangers had made the purchase at the sale. There was absent the necessary continuity of a proprietary interest between the old and new companies (cf. *Le Tulle* v. *Scofield,* 308 U. S. 415, 420), since no interest in the new enterprise was attributable to the stockholders' former position in the old company. Thus the clean break between the two companies does not justify the new company in using the high basis for its assets which they had in the hands of the old company.

The decision herein is not in conflict with *Rex Mfg. Co.* v. *Commissioner,* 102 F. (2d) 325 (C. C. A. 7th), which the court below fully distinguished when it noted (R. 50) that there was actually an equity in the old enterprise in that case which was transferred to the new company. The question in the instant case is now being presented to the Circuit Court of Appeals for the Seventh Circuit in *D. W. Klein Co.* v. *Commissioner* (decided by the Board of Tax Appeals in an unreported opinion September 19, 1940), and until that court undertakes to extend its decision in the *Rex* case to this situation, it cannot be said that a conflict exists between the two circuits.

2. Petitioner alleges conflict (Pet. 8) with *Commissioner* v. *Kitselman,* 89 F. (2d) 458 (C. C. A.

7th) and *Commissioner* v. *Newberry L. & C. Co.*, 94 F. (2d) 447 (C. C. A. 6th) in that it was held in each of those cases that a reorganization within the meaning of the revenue acts could be effected through the medium of bankruptcy or equity insolvency proceedings. But, as carefully pointed out in the opinion below (R. 50), the court did not hold that a reorganization could not be effected by employing the mechanics of bankruptcy. Indeed, the *Newberry* case was decided by the same circuit court of appeals that decided the instant case, and there isn't the slightest suggestion it has overruled itself here.

The question presented in those cases, namely whether there is a sufficient continuity of interest to effect a reorganization where the creditors of the old company become the stockholders of the new company, is now pending before this Court in a group of cases on petitions for certiorari filed both by the Government and by taxpayers. *Helvering* v. *Southwest Consol. Corp.*, No. 286; *Helvering* v. *Alabama Asphaltic Limestone Co.*, No. 328; *Bondholders Committee, Marlborough Investment Co.* v. *Helvering*, Nos. 128, 129; *Palm Springs Holding Corp.* v. *Helvering*, No. 503. Although the issue there involved turns upon the interpretation of the statutory definition of reorganization, as does the instant case, the fact patterns are entirely dissimilar, and a holding with respect to the existence of a reorganization in

those cases should not have any controlling effect upon the present case. Accordingly, the pendency of those cases should not be a reason for granting the writ here.

CONCLUSION

The case was correctly decided by the court below. There is no conflict of decisions. The petition should not be granted.

Respectfully submitted.

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SEPTEMBER 1941.

U. S. GOVERNMENT PRINTING OFFICE: 1941

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On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

REPLY BRIEF TO RESPONDENT'S OPPOSITION.

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On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

REPLY BRIEF TO RESPONDENT'S OPPOSITION.

The opposition interposed by the respondent herein undertakes to put out of view the admitted fact that the stockholders of the old company (who put some additional capital into the new company) retained a control of 50 per cent of the property transferred, within the meaning of Section 113(7) of the Revenue Act of 1932.

The decision of the Court in the case of *Rex Manufacturing Company* v. *Commissioner*, 102 Fed. (2d) 325, turns

upon the fact that "a control of the property of 50 per cent or more remained in the same persons or some of them" who were stockholders of the old company; and the fact that "additional capital" was contributed by the stockholders of the old company to the new company, in order to effect the reorganization, was not denominated a purchase of the property by them. The fact that the creditors of the old company (in the *Rex Manufacturing Company case*) accepted notes of new company for 75 per cent of their claims against the old company is not to be distinguished from the receipt of cash or its equivalent (see *LeTulle* v. *Scofield*, 308 U. S. 415). The only distinguishing feature between this case and the *Rex Manufacturing Company case* is that the creditors of the old company (in the *Rex Manufacturing Company case*) took notes and cash distributed to them by the trustee of the bankrupt's estate; while in this case the notes executed by the new company were apparently held by the trustee of the bankrupt's estate until paid off, *when the proceeds were distributed to creditors.* The difference, if any, is certainly not material on the issue of reorganization.

There is certainly no distinction to be made in the two cases on the fact of "continued control of 50 per cent or more in the property transferred." There was the same "break" *in continuity* of ownership of the property in the case of *Rex Manufacturing Company, supra*, by virtue of the bankruptcy proceeding, as there was in this case; and there can be no distinction between the two cases in the degree of "insolvency" at the time of adjudication. The revenue statute does not interpose "insolvency" as a barrier to reorganization; and there is no provision in the law that only solvent corporations (which may or may not be able to pay their debts in full promptly) may become reorganized under the provisions of Sections 112 and 113 of the Revenue Act of 1932.

The intervention of bankruptcy, by which the title to the property of the bankrupt is *vested* in the trustee as *a fidu-*

ciary, is not a barrier to reorganization (see *Rex Manufacturing Company* v. *Commissioner*, 102 Fed. (2d) 325); and there can be no distinction made in the features of a bankruptcy proceeding in the two cases. In the case of a corporate person a proceeding in bankruptcy is uniform throughout the United States. Therefore, since it is conceded by respondent that reorganization was effected in the case of *Rex Manufacturing Company* v. *Commissioner*, 102 Fed. (2d) 325, there appears to be a direct conflict in this case when the Court below holds that a proceeding in bankruptcy is a barrier to reorganization.

The Court below expressly states that in so far as the decision in the case of *Rex Manufacturing Company* v. *Commissioner, supra,* is in conflict with its decision herein, it declines to follow the same. The only distinction between the two cases is that the Circuit Court of Appeals for the Seventh Circuit holds that the intervention of a bankruptcy proceeding is not a barrier to reorganization; while the Sixth Circuit holds such a proceeding to be a barrier. There is, therefore, a definite conflict to be reconciled by this Honorable Court.

There is no evidence in this case that the transfer of the property of the bankrupt's estate to the new company was effected any differently by the Trustee in Bankruptcy than was the transfer made in the *Rex Manufacturing Company case, supra.* In each case there was an *adjudication* which vested the title to the bankrupt's property in the trustee; and thereafter the trustee of the bankrupt's estate (in each case) accepted an offer by stockholders of the bankrupt to form a new company and take over the property. In each case there was a contribution of additional capital; and in each case notes and cash were paid over to the trustee of the bankrupt's estate for distribution to creditors. The features of *continuity* are identical in each case.

It, therefore, cannot be denied that the conflict arises out of the fact of bankruptcy; and inasmuch as there can be no distinction made in the *modus operandi* of a bankruptcy

proceeding in the Seventh Circuit as distinguished from such a proceeding in the Sixth Circuit, the distinction urged by the respondent as between the two cases serves merely to magnify the conflict relied upon by petitioner as a reason for granting the writ.

Respectfully,

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[redacted]

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 564

MASCOT STOVE COMPANY, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The petition for a writ herein is predicated in part on an asserted conflict between the instant decision and that in *Rex Mfg. Co.* v. *Commissioner*, 102 F. (2d) 325 (C. C. A. 7th) (Pet. 8). In its brief in opposition the Government disputed the alleged conflict, pointing out that the cases were factually dissimilar and that the case of *D. W. Klein Co.* v. *Commissioner*, then pending in the Circuit Court of Appeals for the Seventh Circuit, raised the precise question here involved which would be passed upon for the first time by the Seventh Circuit in that case.

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The Circuit Court of Appeals for the Seventh Circuit has now held in the *Klein* case that there is no reorganization in the circumstances presented here. *The D. W. Klein Co.* v. *Commissioner,* decided November 28, 1941, not yet reported but may be found in 1941 C. C. H., Vol. 4, ¶9769). The court expressly distinguished the *Rex* case, thus definitely eliminating any suggestion of conflict between the two circuits.

Consistently also with the position taken in the Government's brief in opposition, the court stated that the decision of the question involved would not be governed by this Court's determination of the issues pending before it in *Helvering* v. *Southwest Consolidated Corp., Helvering* v. *Alabama Asphaltic Limestone Co., Bondholders Committee, Marlborough Investment Co.* v. *Helvering,* and *Palm Springs Holding Corp.* v. *Helvering,* Nos. 286, 328, 128 and 129, and 503, respectively, October Term, 1941.

Respectfully submitted.

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DECEMBER 1941.

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